

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7299

To be argued by
Michael D. Hess

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MISS MAE M. SMITH
(a/k/a/ Miss Mary M. Smith)

Plaintiff-Appellant,

v.

FREDERICK V. BEHREND; OSCAR
G. RUBIN, ESQ.; DELIA CRAVEN
SMITH, et al.,

Defendants-Appellees

ON APPEAL FROM ORDER AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES
KENYON & ECKHARDT, INC. AND
CHET LANGTON

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Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7299

MISS MAE M. SMITH
a/k/a MISS MARY M. SMITH,

Plaintiff-Appellant,

v.

FREDERICK V. BEHREND;S;
OSCAR G. RUBIN, ESQ.; MRS. DELIA
CRAVEN SMITH, et al.,

Defendants-Appellees

APPEAL FROM ORDER AND JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES
KENYON & ECKHARDT, INC. AND
CHET LANGTON

Statement of Issue

Mae M. Smith ("Appellant") appeals from an order of the United States District Court for the Eastern District of New York (Mark A. Constantino, J.) dated June 1, 1976 dismissing her amended complaint with prejudice as to all defendants, including Kenyon & Eckhardt, Inc. ("K & E") and Chet Langton ("Langton"), for failure to comply with Rule 8(e)(1) of the Federal Rules of Civil Procedure. K & E and Langton submit this brief to urge that the District Court order be affirmed.

The sole issue on this appeal is: Did the District Court properly dismiss the amended complaint with prejudice?

STATEMENT OF THE CASE

Appellant instituted this action by filing a complaint, naming dozens of parties, in December 1975. (R.1.)* That complaint contained certain conclusory allegations of deprivation of civil rights, but failed to include any supporting facts or to allege any of the elements necessary to support such a cause of action--or any other--as to K & E. K & E moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (R. 12-13); other defendants moved to dismiss on various grounds. The District Court dismissed the complaint because it "grossly violates Rule 8(e)(1) Fed.R. Civ.P." (R.36) However, this dismissal was without prejudice, and the Court granted appellant sixty days in which to file an amended complaint.

Appellant served her amended complaint in April 1976 (R.46), again naming dozens of defendants and witnesses and describing in rambling fashion her dealings with them. K & E and Langton moved to dismiss for failure to state a claim upon which relief can be granted, lack of subject matter jurisdiction and because any claims were barred by the statute of limitations. In addition, Langton moved to strike immaterial and scandalous matter in the amended complaint.

* References are to the Record on Appeal.

(R. 50-51; 63-65.) Other defendants again moved to dismiss on various grounds. Appellant did not submit any opposing papers, but she did appear at a hearing before Judge Constantino on May 26, 1976 in opposition to the requested dismissal. By Order dated June 1, 1976 (the language of which subsequently was modified upon request of appellant), Judge Constantino dismissed the complaint, with prejudice, for failure to comply with Rule 8(e)(1) and judgment was entered accordingly, (R. 67-70).

ARGUMENT

POINT I

DISMISSAL OF THE AMENDED COMPLAINT
WITH PREJUDICE ON THE GROUND OF
FAILURE TO COMPLY WITH RULE 8(e)(1)
SHOULD BE AFFIRMED.

Judge Constantino's dismissal of the amended complaint with prejudice for failure to comply with Rule 8(e)(1) of the Federal Rules of Civil Procedure should be affirmed.* As noted above, Judge Constantino dismissed the original complaint without prejudice and with leave to amend. Nevertheless, the amended complaint provides little improvement, if any, and remains hopelessly insufficient. In light of the prior opportunity provided appellant to replead and to comply with the Federal Rules, dismissal with prejudice of the amended complaint was proper. Prezzi

* Rule 8(e)(1) requires in relevant part that: "Each averment of a pleading shall be simple, concise and direct."

v. Schelter, 469 F.2d 691, 692 (2d Cir. 1972), cert. denied, 411 U.S. 935 (1973); Vance v. American Soc. of Composers, Authors & Publishers, 14 F.R.D. 30, 31 (S.D.N.Y. 1953). See also, Boruski v. Stewart, 381 F. Supp. 529, 533 (S.D.N.Y. 1974).

POINT II.

DISMISSAL PROPERLY MAY BE AFFIRMED ON GROUNDS OTHER THAN THOSE ON WHICH THE DISTRICT COURT RELIED

A Court of Appeals may affirm a District Court opinion on grounds other than those upon which the District Court relied. Helvering v. Gowran, 302 U.S. 238, 246-47 (1937). In the instant appeal, the amended complaint should be dismissed not only for violation of Rule 8(e)(1), but also for lack of subject matter jurisdiction (Point A); for failure to state a claim upon which relief can be granted (Point B); and because claims against K & E and Langton are barred by the statute of limitations (Point C).

A. The Federal Courts Lack Subject Matter Jurisdiction

To the extent that one must guess at the allegations of the complaint concerning K & E and Langton (Amended Complaint, pp. 16-17), appellant seems to claim some sort of tortious conduct such as defamation. However, even if there were merit to such claims -- which there is not -- they would arise under state law. There is no Federal Court subject matter jurisdiction to hear such claims. First, no federal question is thereby presented. See Rosenberg v. Martin, 478 F.2d 520, 524 n.4 (2d Cir.), cert. denied, 414 U.S. 872

(1973); Heller v. Roberts, 386 F.2d 832 (2d Cir. 1967). And the complete diversity of citizenship required for jurisdiction under 28 U.S.C. §1332 (Strawbridge v. Curtiss, 3 Cranch (7 U.S.) 267 (1806)) does not appear on the face of the amended complaint. Elders v. Consolidated Freightways Corp. of Delaware, 289 F. Supp. 630, 633 (D. Minn. 1968). Indeed, it is expressly contradicted by the information contained in the original complaint.

B. The Amended Complaint Fails to State a Claim Upon Which Relief Can Be Granted

In an apparent effort to avoid these fatal shortcomings, appellant on this appeal attempts to characterize the alleged conduct as violative of her civil rights. (Brief for Appellant, p. 12). Yet the amended complaint fails to state a claim under the Civil Rights Acts, 28 U.S.C. §1343 and U.S.C. §§1983 and 1985(3). As this Court has stated:

"[I]n spite of its broad language [§1983] was not intended to turn every defeat or denial of a claimed state right into a federal right with a federal remedy." (Bradford Audio Corp. v. Pious, 392 F.2d 67, 72 (2d Cir. 1968)).

See also, Huggins v. White, 321 F. Supp. 732, 734 (S.D.N.Y. 1970):

"[F]ederal jurisdiction under 42 U.S.C. §1983 does not extend to all controversies between individual citizens...but only to deprivation of constitutional rights arising from the action of persons acting under color of state law..." (Citations omitted.)

Here, there is no showing of any kind of action "under color of state law" by K & E or Langton, nor could there be, since K & E is a private corporation and Langton is a private citizen and an employee of K & E. Neither is there any

showing of acts taken in conjunction with persons acting under color of state law. Consequently, "an indispensable element of a plaintiff's [1983] case" is missing and the cause of action must be dismissed. Jobson v. Henne, 355 F.2d 129,133 (2d Cir. 1966); Post v. Payton, 323 F. Supp. 799, 802 (E.D.N.Y. 1971). See also, Powell v. Workmen's Compensation Board of State of New York, 327 F.2d 131, 137 (2d Cir. 1964). Neither does §1985(3) provide a basis for relief, since there is no showing of any invidious discrimination by K & E or Langton against a class of persons to which plaintiff belongs. Griffin v. Breckinridge, 403 U.S. 88, 101-02 (1971).^{*} The Griffin court specifically rejected any notion of the Civil Rights Acts as "a general federal tort law." (Id. at 102). As the Sixth Circuit declared in Place v. Shepherd, 446 F. 2d 1239, 1240 (1971);

"The case present another variety of the ever increasing attempts to get into Federal Court by labelling real or imagined wrongs as deprivations of Civil Rights guaranteed by the United States Constitution."

Further, the Constitutional Amendments on which Appellant purports to rely (Fourth, Fifth, Sixth, and Eighth) protect only against invasion by federal or state governments and their officials, and, in many cases, apply only to criminal proceedings. See, e.g., Powell v. Texas, 392 U.S. 514

^{*} Several courts since Griffin further have required a showing of state action under §1985(3) in a case such as this. See Dombrowski v. Dowling, 459 F.2d 190, 195 (7th Cir. 1972) (Stevens, J.); Flores v. Yeska, 372 F. Supp. 35, 39 (E.D. Wis. 1974); Family Forum v. Archdiocese of Detroit, 347 F. Supp. 1167, 1172 (E.D. Mich. 1972).

531-32 (1968); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Honeycutt v. Aetna Insurance Co., 510 F. 2d 340, 348 (7th Cir.) cert. denied. 421 U.S. 1011 (1975); Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140, 1143 (N.D. Ala. 1971), aff'd, 456 F. 2d 1294 (5th Cir. 1972), cert. denied, 410 U.S. 946, reh. denied, 411 U.S. 910 (1973). Neither is there any pleading of any conduct by K & E or Langton of the kind proscribed by those amendments, even if they did apply to individuals. Finally, appellant pleads that she applied for a job with K & E in 1959 and quit without giving notice in 1960. (Amended Complaint, p. 16). This conclusively precludes any claim of violation of Thirteenth Amendment rights. Flood v. Kuhn, 443 F.2d 264, 268 (2d Cir. 1971), aff'd 407 U.S. 258 (1972); United States v. Shackney, 333 F. 2d 475, 486 (2d Cir. 1964).

C. Any Claims Against K & E and Langton Are Barred By
By The Statute of Limitations

Assuming arguendo that the amended complaint states a claim against K & E and Langton, and further assuming the existence of some jurisdictional basis, any such claim nevertheless must be barred by the applicable statute of limitations. The statute of limitations for defamation (New York CPLR §215(3)) requires that suit be brought within one year from the date the cause of action accrued. Alleged claims arising under the Civil Rights Acts are governed by a three-year statute of limitations

of CPLR 214(2). Swan v. Board of Higher Education of the City of New York, 319 F.2d 56,60 (2d Cir. 1963); Montagna v. O'Hagan, 402 F.Supp. 178, 180 (E.D.N.Y 1975). Yet a review of the complaint reveals that the claims, concern alleged conduct by K & E and Langton in 1959 and 1960, more than 15 years prior to service of the original complaint. There is simply no allegation anywhere in the amended complaint of any conduct by K & E or Langton which would not be time-barred.

CONCLUSION

For all the foregoing reasons, the Order and Judgment of the District Court dismissing the Amended Complaint with prejudice should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
MISS MAE M. SMITH (a/k/a MISS
MARY M. SMITH,

Docket No. 76-7299

Appellant,

- against -

AFFIDAVIT OF SERVICE

FREDERICK V. BEHRENDT, OSCAR
G. RUBIN, ESQ.; MRS. DELIA
CRAVEN SMITH, et al.

Appellees.
-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RUTH MILLER, being duly sworn, deposes and says:

1. That she is not a party to the action, is over
18 years of age and resides at 32 South Munn Avenue, East
Orange, New Jersey.

2. That on the 12th day of October 1976 she served
two copies of the within Brief on Appeal upon each of the
following parties and attorneys in this action, at the
addresses designated by said parties and attorneys for that
purpose by depositing same enclosed in a postpaid properly
addressed wrapper, in an official depository under the
exclusive care and custody of the United States post office
department within the State of New York:

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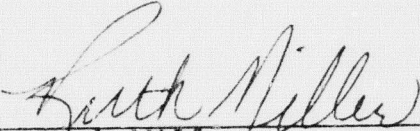
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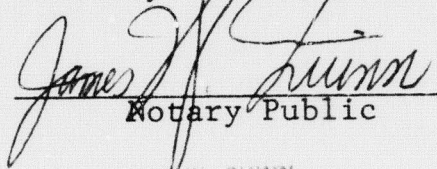
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United States Attorney
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Brooklyn, New York 11201


Ruth Miller

Sworn to before me this
12th day of October 1976


Notary Public

JAMES W. QUINN
Notary Public, State of New York
No. 60,947,0501
Qualified in Westchester County
Certificate filed in New York City
Commission Expires 12/31/78

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the
read the foregoing
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and
belief, and that as to those matters deponent believes it to be true.
Sworn to before me, this day of 19

, being duly sworn, deposes and says that
in the within action: that deponent has
and knows the contents thereof; that

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit. its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

, being duly sworn, deposes and says that deponent is the
the corporation

Sworn to before me, this

day of

19

STATE OF NEW YORK, COUNTY OF

882

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19____ deponent served the within _____ attorney(s) for _____ upon _____ in this action, at _____

for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19 the address designated by said attorney(s)

STATE OF NEW YORK, COUNTY OF

56. :

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19____ at No. _____
deponent served the within
upon
the _____
person so served to be the person mentioned herein, by delivering a true copy thereof to _____ personally. Deponent knew the
Sworn to before me, this _____ day of _____ 19____ and described in said papers as the _____ therein.

NOTICE OF ENTRY

Sir :—Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

To

Attorney for

NOTICE OF SETTLEMENT

Sir :—Please take notice that

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

To

Attorney for

Index No. 76-7299

Year 19

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**MISS MAE M. SMITH (a/k/a
MISS MARY M. SMITH**

Appellant,

- against -

**FREDERICK V. BEHREND, OSCAR G
RUBIN, ESQ.; MRS. DELIA
CRAVIN SMITH, et al.**

Appellees.

AFFIDAVIT OF SERVICE

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(212) PLAZA 8-7800

To

Attorney for

Service of a certified copy of the within

is hereby admitted.

Dated,

Attorney for